In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 488

IN THE MATTER OF LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS AND PETER W. WEBER, PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD[1]

OPINIONS BELOW

The judgment of conviction and sentence imposed by the court of appeals is printed at page 19 of the petition. The court's findings of fact, conclusions of law, and order are printed at pages 22–25 of the petition.

JURISDICTION

The judgment of conviction was entered on June 17, 1964, and a timely petition for a new trial was denied on July 16, 1964 (Pet. 2, 25). On August 12, 1964,

[1] The Board initiated the present proceeding, requesting the court below to institute criminal contempt proceedings against petitioners, and the Board's attorneys prosecuted the case on behalf of the court.

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the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 14, 1964. The petition was filed on September 11, 1964. This Court has jurisdiction under 28 U.S.C. 1254(1).[2]

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to try and convict petitioners for criminal contempt upon their refusal to comply with the court's decree enforcing an order of the National Labor Relations Board.

2. Whether the action of the court of appeals deprived petitioners of a constitutional right to appeal their conviction.

3. Whether petitioner Weber was properly included as a party defendant in the contempt proceeding.

4. Whether petitioners were entitled to a trial by jury.

STATUTE INVOLVED

Section 401 of Title 18 of the United States Code reads in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment * * *. (3) Disobedience or resistance to its lawful writ * * *.

STATEMENT

On January 8, 1964, the court below sustained the National Labor Relations Board's finding that petitioner, Local 825, International Union of Operating

[2] Presumably by inadvertence, the petition (p. 2) invokes Section 1254(2), which is plainly inapplicable.

Engineers, had violated Section 8(b)(4)(D) of the National Labor Relations Act. The violation consisted of exerting secondary pressure against Nichols Electric Company, an electrical subcontractor, to force Nichols to assign certain work to operating engineers, represented by Local 825, rather than to electricians represented by the International Brotherhood of Electrical Workers, despite the fact that the Board had previously determined that Local 825 was not entitled to this work. On February 11, 1964, the court entered its decree enforcing the Board's order (Pet. 22). *National Labor Relations Board* v. *Local 825, International Union of Operating Engineers, AFL–CIO*, 326 F. 2d 213 (C.A. 3), enforcing, 140 NLRB 458. The order directed "Local Union 825, International Union of Operating Engineers * * * and its officers, agents, representatives * * *," *inter alia*, to post "at its business office," and to furnish to the Board's Regional Director, signed copies of a notice stating that "We will not engage in, or induce or encourage any individual employed by Nichols Electric Company, Selby Drilling Company, Elmhurst Contracting Company *** * to engage in, a strike or refusal * * * to perform * * * services * * * where an object thereof in either case is to force or require Nichols Electric Company to assign the work of operating power-driven drilling and hoisting equipment to employees engaged as operating engineers who are represented by Local Union 825 * * * rather than to employees represented by another labor organization * * *" (Pet. 16).

After the entry of the court's decree, representatives of the Board's Regional Office made repeated efforts, through petitioner Weber[1] and other representatives of Local 825, to obtain compliance with the provisions of the Board's order requiring the posting of the notice, but the Union and its representatives refused to comply (Pet. 24–25).[2] On March 27, 1964, the Board petitioned the court of appeals to institute criminal contempt proceedings against Local 825 and Weber for wilfully disobeying and refusing to com-

[1] Petitioner Weber is the business manager of Local 825 (Pet. 2).

[2] The transcript of the testimony adduced before the court below has been filed with the petition. It reveals the following with respect to the efforts to obtain compliance:

After the entry of the court's decree, Board Compliance Officer Arthur West repeatedly attempted, without success, to reach Weber by letter and by telephone to determine whether the Union intended to comply with the decree (Tr. 24, 27, 40, 42, 43). On February 24, West discovered that Weber, his executive aide, and Union attorney Durkin had come to the Board's Newark Regional Office (where West worked) on another matter (Tr. 44). Finding them there, West asked whether the Union would post and sign the notices. At first, Durkin stated that it would, and West therefore went to get the notices for signature. When he returned, Weber told West that the notice was "too broad," that it "could not" be posted, and that, "I will not sign those notices" (Tr. 46). West cautioned Durkin that the Board would institute contempt proceedings if the Union remained obdurate (Tr. 47). When Durkin failed to respond to still another telephone call on February 27, West prepared a telegram for the Regional Director's signature, informing the Union and its attorneys that, unless they notified the Regional Director by the close of business on that day that the Union had posted and signed the notices, the Regional Director would recommend that the General Counsel "proceed to contempt" (Tr. 5). The telegram was sent, but the Union did not comply.

ply with the court's decree. The petition further requested that the court appoint Board attorneys as counsel for the court to prosecute the criminal contempt (Pet. 11–15). On April 8, 1964, the court issued an order to show cause, directing both Local 825 and Weber to appear before it on May 4, 1964 (Pet. 18).[5]

On June 18, after a hearing at which both testimony and documentary evidence were presented, the court adjudged Local 825 and Weber guilty of criminal contempt, and fined the former $15,000 and the latter $5,000 (Pet. 19). Petitioners filed a motion for new trial, and a motion for findings of fact—neither of which raised any of the questions sought to be presented in the present petition for certiorari (Pet. 20, 21). The court entered findings of fact, but denied the motion for a new trial (Pet. 22–25).[6]

DISCUSSION

Petitioners have asked this Court to decide four questions: 1) whether the courts of appeals have jurisdiction to try criminal contempts; 2) whether trial before an appellate court deprived petitioners of a constitutional right to appeal their convictions; 3) whether petitioner Weber was properly made a party defendant; and 4) whether petitioners were

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[5] After service of the show cause order, the Union posted the notices (Pet. 24).

[6] In its findings, the court found, *inter alia*, that both Local 825 and Weber, its principal managing agent, had "deliberately, intentionally and wilfully" refused, until April 14, 1964, to post the notices required by the Board's order and the court's decree (Pet. 25).

constitutionally entitled to a jury trial. We show below that the first three questions are wholly insubstantial, but we do not oppose certiorari to resolve the fourth question.

1. The courts of appeals clearly have jurisdiction to try criminal contempts. Section 401 of the Criminal Code (*supra*, p. 2) provides that "A court of the United States shall have power to punish by fine or imprisonment * * * (3) Disobedience or resistance to its lawful writ." The courts of appeals have repeatedly exercised that power without questioning its existence. *E.g., Tornanses* v. *Melsing*, 106 Fed. 775, 790 (C.A. 9), petition for habeas corpus denied, *sub nom. In re Alexander McKenzie*, 180 U.S. 536; *In re Whitney & Co.*, 273 F. 2d 211 (C.A. 9); *In re Door*, 195 F. 2d 766 (C.A. D.C.); *National Labor Relations Board* v. *Star Metal Mfg. Co.*, 187 F. 2d 856 (C.A. 3); *National Labor Relations Board* v. *Essex County News Co.*, 28 LRRM 2634 (C.A. 3); *In re Seafarers' International Union, No. 5506* (C.A. 1, decided June 15, 1963) (unreported); *National Labor Relations Board* v. *Conover Motor Co.* (C.A. 10), 8 Court Decisions Relating to the National Labor Relations Act 945 (C.P.O., 1955). So has this Court. *United States* v. *Shipp*, 203 U.S. 563. See, also, *Merrimack Riv. Sav. Bank* v. *Clay Center*, 219 U.S. 527.

We have found no decisions suggesting that appellate courts lack the contempt power. The question not passed upon in *United States* v. *Barnett*, 376 U.S. 681, to which petitioners refer (Pet. 5), was whether "the Court of Appeals had * * * jurisdiction

in the matter *since its mandate had been issued and the case had been remanded to the District Court"* when the alleged contempt **occurred** (p. 689, emphasis supplied).

2. The Constitution does not compel either the States or the federal government to provide appellate review of criminal proceedings. *Griffin* v. *Illinois*, 351 U.S. 12, 18; *McKane* v. *Durston*, 153 U.S. 684, 687–688. Cf. *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 331–336; *New Orleans* v. *The Steamship Co.*, 20 Wall. 387, 392. Indeed, "no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again with exceptions not now pertinent) until 1907." *Griffin* v. *Illinois*, *supra*, at 21 (Frankfurter, J., concurring). The "judicial language" petitioners cite in *Brown* v. *Looney*, 249 F. 2d 61 (C.A. 10), and *Rayne* v. *Warden*, 198 F. Supp. 552 (D. Md.) (Pet. 5), does not reflect the view that due process requires an appellate proceeding in criminal cases. The contexts of those statements demonstrate that both courts were applying the well established constitutional principle that, where an appellate proceeding *is* provided, the government must not unlawfully obstruct access to it. See authorities cited in *Brown* v. *Looney*, *supra*, 249 F. 2d 62, n. 2.

3. Petitioner Weber was properly cited as a defendant in the contempt proceeding. The Board's

order was directed to "Local Union 825 * * * and its officers, agents, representatives." 140 NLRB 458, 465. Petitioner Weber does not dispute the finding of the court below that he is the Local's business manager and its highest paid elective officer (Pet. 23). He admitted that he was the "operative head of Local 825" (Tr. 134), and the court below found that he exercises "final authority on behalf of said Union with respect to compliance with orders of the National Labor Relations Board and with decrees of this Court enforcing said orders" (Pet. 23). These facts support the court's conclusion that petitioner "is and at all times herein materiai has been an officer, representative and agent of respondent Local Union * * *." Weber was therefore a proper defendant. See *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U.S. 9, 14; 7 Moore, *Federal Practice,* par. 65.13, p. 1672 (1955), citing, *inter alia, Le Tourneau Co.* v. *National Labor Relations Board,* 150 F. 2d 1012 (C.A. 5).

4. For the reasons set forth in the majority opinion in *United States* v. *Barnett,* 376 U.S. 681, 692–700, we believe that petitioners were not constitutionally entitled to a jury trial on the charges of criminal contempt. But we recognize that the penalty imposed may not satisfy the dictum in *Barnett* to the effect that "Some members of the Court are of the view that * * * punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses" (*Id.,* at 694–695, n. 12). See *District of Columbia* v. *Clawans,* 300 U.S. 617. Accordingly, we

do not oppose certiorari to resolve the question whether petitioners were entitled to trial by jury in light of the penalty imposed, or are now entitled to a diminution of sentence in light of the fact that they were not tried by a jury.[*]

CONCLUSION

For the foregoing reasons, we submit that the petition for certiorari should be denied, except with respect to the fourth question presented.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GEORGE B. DRIESEN,
Attorney,
National Labor Relations Board.

NOVEMBER 1964.

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[*] We do not tax petitioners with failing to demand trial by jury in the court below since, under this Court's decision in *Barnett*, they had no constitutional or statutory right to jury trial. It might be argued, however, that, after sentence (some ten weeks after *Barnett* was decided here), petitioners should have raised the point below and that their failure to do so precludes them here. But, since the legality of a sentence is always open to challenge (see Rule 35, F.R.Cr.P.) and no useful purpose would be served by requiring the court below to construe this Court's *dictum* in *Barnett*, we do not urge remand to the court of appeals.